No. 48699-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN GLEN THURMAN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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I. ISSUES

A. Did Thurman receive effective assistance from his trial counsel throughout the proceedings?

B. Should this Court impose appellate costs should the State prevail?

II. STATEMENT OF THE CASE

On November 23, 2015 the State charged Thurman with three counts of Assault in the Third Degree. CP 1-3. The allegations stem from an incident where Thurman assaulted hospital personnel and a police officer. *Id.*

Thurman was brought to the hospital after having been contacted by police in Centralia, Washington. CP 5. Thurman had entered a nail salon and refused to leave. *Id.* Thurman was drinking a beer and appeared intoxicated. *Id.* Thurman was transported to Centralia Providence Hospital for a medical evaluation. *Id.*[1]

Thurman arrived at the hospital by ambulance. 2RP 33. Thurman was soaked in urine, wet, agitated, restless, and appeared angry at the world. 2RP[2] 34-35. Nurse Judy Burchett

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[1] The State notes that Thurman states in his briefing that Thurman was arrested by officers. Neither the probable cause statement nor the transcript states Thurman was arrested at this point by the police.

[2] There are two different sets of consecutively paginated verbatim report of proceedings. The State will refer to the pretrial hearings, 1/7/16; 1/14/16; 1/15/16, and the hearing to set sentencing, 1/21/16, as 1RP. The State will refer to the trial, 1/20/16, and sentencing hearing, 3/2/16, as 2RP.

attempted to do the initial screening process with Thurman. 2RP 33-35.

Nurse Burchett was familiar with Thurman, she had seen him 10 to 15 times before, and knew Thurman by name. 2RP 33. Similarly, Thurman knew Nurse Burchett by name. *Id.*

Thurman was not cooperative. RP 33-35. Thurman would not allow Nurse Burchett to get a blood pressure reading or put the pulse oximeter on his finger. 2RP 33, 35. Thurman was screaming profanities at Nurse Burchett, he was angry, his speech was slurred, and his coordination was clumsy. 2RP 33. Yet Thurman appeared to understand and track the conversation Nurse Burchett was having with him. 2RP 35.

When Nurse Burchett attempted to get Thurman's blood pressure and oxygen 2 saturation level he ripped off the cuff, threw it on the floor, continued to shout profanities and was belligerent. 2RP 35. Nurse Burchett bent down to pick up the cuff. 2RP 35. While bent over something caught Nurse Burchett's eye, it was movement, and she looked over just in time to see a fist come over the rail of the bed. 2RP 35. Nurse Burchett deflected back, and the fist came back across just underneath her breast and belly, and

caught her scrub jacket. 2RP 35. Thurman made contact with Nurse Burchett. 2RP 35. Nurse Burchett was not hurt. 2RP 35.

Nurse Burchett informed Thurman that they were done. 2RP 36. Nurse Burchett covered up Thurman with a hot blanket, turned out the lights, and reported what happened to the charge nurse. 2RP 36. Security was called to warn the staff. 2RP 36. Nurse Burchett was stunned because Thurman had never acted in such a manner towards her before. 2RP 36.

Dr. Derry and medical scribe Christoffer Amdahl went into Thurman's room. 2RP 59, 79. Dr. Derry had seen Thurman at least one time previously. 2RP 57. Dr. Derry said,

> "Steven, just open your eyes for me." And I was on his face side. "I just need to see your eyes so I know you are okay." And so then he opened his eyes, looked at me, and then with his right hand tried to swing at me, but I ducked out. And so then he saw me duck away, so he then tried to back hand grab in the direction that I was ducking away.

2RP 60.

Ultimately the police were called and Thurman was arrested for the assaults on hospital staff. 2RP 109. Officer Lowrey put Thurman into Officer Lowrey's patrol car. 2RP 93-94. Thurman was uncooperative. *Id.* Once in the patrol car Thurman began to kick the window hard enough to make it bow. 2RP 112. Officer Lowrey

opened the door and told Thurman to stop kicking the door or Thurman would end up getting hobbled. *Id.* Thurman shouted obscenities at Officer Lowrey. *Id.* Every time Officer Lowrey would attempt to reach into the patrol car Thurman would kick toward Officer Lowrey. 2RP 113. Officer Lowrey was never full on kicked by Thurman, he was grazed. 2RP 115. Thurman was eventually pulled out of the patrol car. 2RP 116.

Thurman received abrasions when he was pulled out of the patrol car and had to be treated for the abrasions prior to being transported to jail. 2RP 116-17. While being treated for his abrasions Thurman stated, he did not care if he was going to jail because he would have a place to sleep, food, and get his medical bills paid. 2RP 42, 120. Thurman also stated he would get his social security. 2RP 42.

According to those who know Thurman he is a functioning alcoholic. 2RP 44, 120. Thurman, while having alcohol in his system, is aware of what he is doing. 2RP 44, 120-21.

Thurman was convicted as charged after a jury trial. CP 75-77. Thurman sought consideration for the Residential Chemical Dependency Treatment-Based Alternative sentence (DOSA). CP 78. Thurman went through the evaluation screening process. CP

79-83. The evaluator found that Thurman was not eligible for a DOSA sentence due to mental health concerns. CP 81.

Thurman was sentenced to a standard range sentence of 14 months in the Department of Corrections. CP 85-89. Thurman timely appeals his conviction and sentence. CP 100.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THURMAN RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Thurman's attorney provided competent and effective legal counsel throughout the course of his representation. Thurman asserts his trial counsel was ineffective for failing to request a competency evaluation. Brief of Appellant 6-10. Thurman's attorney is not required to request a competency evaluation for a client that is competent. Thurman received effective assistance from his trial counsel and his claim to the contrary fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be

considered. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Thurman's Attorney Was Not Ineffective For Failing To Request An Unneeded Competency Evaluation.

To prevail on an ineffective assistance of counsel claim Thurman must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the

defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

A person accused of a crime has a fundamental right to be competent while standing trial. *State v. Heddrick*, 166 Wn.2d 898, 903, 215 P.3d 201 (2009) (internal citations omitted). "'Washington law affords greater protection by providing that '[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.'" *Heddrick*, 166 Wn.2d at 903, *citing In re Pers. Restraint of Flemming*, 142 Wn.3d 853, 862, 16 P.3d 610 (2001) (alteration in original, quoting RCW 10.77.050).

The procedures set forth in the competency statute are mandatory. RCW 10.77.050(1)(a); *Heddrick*, 166 Wn.2d at 904.

> Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

RCW 10.77.060(1)(a). Failure to observe the procedure in RCW 10.77.050 is a violation of a defendant's due process. *Heddrick*, 166 Wn.2d at 904.

Thurman alleges his trial counsel was ineffective for failing to request a competency evaluation after receiving the DOSA evaluation. Brief of Appellant 7. Thurman also claims his statements at sentencing were not indicative of a person who had a rational understanding of the charges and the court proceedings he faced. *Id.* Thurman further argues there was sufficient evidence that would lead to questioning Thurman's competency before, during and after the trial, and there is a probability sufficient to undermine the confidence of the outcome of the proceeding. *Id.* at 9. Thurman is asking this Court for remand to the trial court to determine whether a retrospective competency determination is feasibe and if not, to vacate the conviction and sentence. *Id.* at 10.

The DOSA evaluation is not indicative of incompetence. A person can suffer mental illness and be competent for criminal proceedings. The DOSA evaluator did find the following self-reported mental health issues:

> Client reports he was diagnosed with anxiety and depression. He was suicidal during the assessment stating, "I don't care if I live or die." When asked when he last thought about suicide he replied he thinks

> about it every day> When asked if he had a plan to end his life he stated he would drink a bottle of whiskey and take sleeping pills and if was available right now he would end it. Jail staff was notified and Cascade MH was called. Client would rant about suing the police department and would become extremely agitated.

CP 82. The evaluator did comment about Thurman's focus on the police department, suing the police department, and the need to refocus Thurman on the evaluation. CP 82. The evaluator also commented that Thurman would not benefit from treatment not only due to his mental health issues but also because he stated that he would continue to drink because he loved it. CP 81-82.

Incompetency is defined as, "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15). There is nothing in the DOSA evaluation to suggest Thurman did not understand the evaluation. There is nothing in the DOSA evaluation to suggest Thurman did not understand the criminal proceedings against him. *See* CP 81-82. Being angry with the police, having a mental illness, and refusing to stop drinking are not indicative of incompetence. While the State is sympathetic to Thurman's mental health issues, in particular his obvious need for intervention due to his suicidal

ideations, this does not make him lack the capacity to understanding the nature of the pretrial proceedings, the jury trial, or the sentencing hearing, or make Thurman unable to assist in his defense. Thurman obviously needs mental health care, but that alone does not make him incompetent.

At Thurman's sentencing hearing Thurman during his opportunity to speak to the trial court stated the following:

> Your Honor, I wouldn't make a story up about being tased. He tased me. I have the scars to prove it. He took me to the hospital. I had bandages on both arms. Why he drug me, I don't know. I didn't do anything. I was merely smoking a cigarette across the street, from there I was going to go down to the post office. From there I was going down to Destiny where I had my suitcases, and that was my intentions. And from there I planned on going back to Morton where I lived there for over 25 years. And I've got friends there. That's what my intentions are when I get out, is go back to Morton, go back to the mountains.

RP 188-89. There is nothing in the sentencing record that would indicate Thurman was incompetent either. Thurman was intoxicated when he came into the emergency room. RP 43-44, 101, 120. While the people who knew Thurman stated he was a functioning alcoholic and knew what he was doing, they also stated he was more aggressive and acting different than normal. RP 36, 43-44. It is unclear why Thurman believed he was tased during his original contact with officers. But Thurman's recitation of other events, that

Officer Lowrey drug him out of the patrol car and that he bandages on both of this arms, is an accurate description of the events. RP 42, 96-97, 113, 118. The remainder of what Thurman told the trial court very well could have been his plan for that evening. There is nothing once again that is indicative of Thurman lacking the capacity to understand the sentencing procedure or assist in it.

There is no indication in the report of proceedings that Thurman has requested to be transcribed which shows he is incompetent. *See* 1RP; 2RP. Thurman does not have any hearing prior to his omnibus hearing, on January 7, 2016, transcribed for this Court's consideration. 1RP; 2RP. This Court declines to address issues where the appellant fails to provide an adequate record to review an alleged error. *State v. Murphy*, 35 Wn. App. 658, 666, 669 P.2d 891 (1983).

There were three hearings prior to the omnibus hearing, the initial appearance on November 24, 2015, the arraignment on December 3, 2015, and the originally scheduled omnibus hearing which was continued. Supp. CP Initial App.; Supp. CP Arraignment; Supp. CP Omnibus 12/17/15.[3] Also, Thurman neglects to inform this Court that his attorney filed a motion, which was granted, for

[3] The State will be filing a supplemental designation of Clerk's papers.

public expenses to pay for an evaluation for Thurman with Dr. Trowbridge for diminished capacity. Supp. CP Motion for Expert Eval; Supp. CP Order Authorizing Expert Services. This is further evidence there is no competency issues that needed to be addressed. If trial counsel was willing to go through the necessary steps to secure an independent expert evaluation for diminished capacity then trial counsel would have raised competency issues if they had arisen.

Thurman has not met his burden to show his counsel was deficient for failing to request a competency evaluation for Thurman at any time during the proceedings based upon the record presented to this Court. Thurman's actions during his DOSA evaluation and his sentencing hearing do not lead to the conclusion that he was incompetent and in need of an evaluation. This Court should reject Thurman's argument, find his trial counsel effectively represented Thurman, and affirm his convictions.

B. APPELLATE COSTS ARE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn. App. 342, 989 P.2d 583 (1999). As the Court

pointed out in *State v. Sinclair*, the award of appellate costs to a prevailing party is within the discretion of the appellate court. *State v. Sinclair,* 192 Wn. App. 380, 385, 367 P.3d 612 (2016); *See also* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976[4], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 82 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, *supra*, at 239, the Supreme Court held this statute constitutional, affirming

[4] Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

this Court's holding in *State v. Blank*, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

Nolan, 141 Wn.2d 620, noted that in *State v. Keeney*, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. *Keeney*, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. Nolan 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in *State v. Edgley*, 92 Wn. App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. *Nolan*, at 624-625, 628.

In *Nolan*, as in most other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in *Blank*, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *Sinclair*, prematurely raises an issue that is not before

the Court. *Sinclair,* 192 Wn. App. at 390-91. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id*. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241–242. *See also State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See State v. Lundy*, 176 Wn. App. 96, 104, n.5, 308 P.3d 755 (2013). Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See*

State v. Woodward, 116 Wn. App. 697, 703-04, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See Blank* at 236-237, quoting *Fuller v. Oregon*, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. *Id.*, at 835-837.

The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. *Id*., at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As *Blazina* instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Division I pointed out in *State v. Sinclair*, the Legislature did not include

such a provision in RCW 10.73.160. *Sinclair,* 192 Wn. App. at 389. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. Hopefully, pursuant to *Blazina*, the trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. It should be the burden upon the defendant to make this record that he or she is unable to pay, as he or she holds all the cards, so to speak. The State is unable to refute much of what a defendant asserts to the trial court regarding their ability to pay, unless information has come out during the trial or other hearings that contradicts the defendant's assertions. Without a factual record the State has nothing to respond to.

In this case the State has limited information in regards to Thurman's alleged indigency. The State acknowledges that Thurman allegedly is on SSI and had/has a bone disease. The State also acknowledges the court found him indigent. If this is the standard this Court wishes to use, there is nothing the State can do to rebut it. The State has also not indicated if it is going to request

appellate costs, and doing this briefing at this point is speculative at best.

IV. CONCLUSION

Thurman received effective assistance from his trial counsel, as there was no evidence Thurman lacked competency during any part of the proceedings, and his trial counsel's failure to request a competency evaluation was not deficient. This Court should therefore affirm Thurman's convictions. This Court should reserve the decision regarding the imposition of costs on appeal if the State prevails, as the State has not yet requested costs.

RESPECTFULLY submitted this 15th day of November, 2016.

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. STEVEN GLEN THURMAN, Appellant.	No. 48699-7-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On November 15, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Marie Jean Trombley attorney for appellant, at the following email addresses: marietrombley@comcast.net.

DATED this 15th day of November, 2016, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

November 15, 2016 - 10:06 AM

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